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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION

CISCO SYSTEMS, INC.,

Plaintiff,

vs.

ARISTA NETWORKS, INC.,

Defendant.

CASE NO. 5:14-cv-5344-BLF (PSG)

**CISCO SYSTEMS, INC.'S OPPOSITION
TO MOTION TO STRIKE**

**VERSION OF DOCUMENT
SOUGHT TO BE SEALED**

Date: July 27, 2016
Time: 2:00 p.m.
Dept.: Courtroom 7
Judge: Nathanael Cousins

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1 **I. INTRODUCTION**

2 Plaintiff Cisco Systems, Inc. (“Cisco”) respectfully urges this Court to deny the Motion to
3 Strike (Dkt. 305) filed by Defendant Arista Networks, Inc. (“Arista”). Federal Rule of Civil
4 Procedure 26(e) requires that a party supplement its discovery responses if the party learns that a
5 response is “incomplete or incorrect.” Contrary to Arista’s arguments, each of Cisco’s supplemental
6 responses in question was timely and proper under that rule, and provided information that could not
7 have been provided sooner in light of Arista’s own discovery delays.

8 *First*, Cisco’s May 27, 2016 supplemental response to Interrogatory 2 concerning its
9 “HelpDesc” allegations was timely and proper. That response, providing precise source code citations
10 to the “HelpDesc” command descriptions that Arista unlawfully copied, was not possible before
11 completion of a laborious review of Arista’s source code as well as a review of Arista switches that
12 Arista made available to Cisco for the first time only on May 18, 2016. *Second*, Cisco’s supplemental
13 response to Interrogatory 15 regarding its claim for lost profits was similarly timely and proper. That
14 response, providing the names of particular customers as to whom Arista caused Cisco lost sales,
15 depended upon Cisco’s access to Arista financial information that Arista produced only less than two
16 weeks prior. Arista’s motion should be denied.

17 **II. FACTUAL BACKGROUND**

18 **A. Cisco’s Claim for “HelpDesc” Copyright Infringement**

19 Cisco has given Arista detailed notice of Arista’s extensive and blatant copyright infringement
20 since the beginning of this case. Starting in December 2014, Cisco put Arista on notice of its
21 copyright allegations through a very detailed complaint. *See* Dkt. 1 at ¶¶ 9, 24-30, 40-65 (alleging
22 copyright infringement by citing hundreds of instances of Arista copying of Cisco user manuals and
23 guides—including typographical errors made by Cisco in its original works and reproduced in Arista’s
24 copy-cat works—command expressions, command modes and more); *see also id.* at Exhibits 1 and 2
25 (providing comparative charts showing Arista’s copying of Cisco materials). Cisco was also clear
26 from the start that the scope of its copyright claims covered not just the multi-word command
27

expressions, but many other instances of verbatim copying by Arista software and associated documentation. *See, e.g., id.* at ¶ 59.

Arista's copying is well-documented in the record. Cisco learned during this case that Arista's CTO was touting the fact that Arista had copied the user interface for Cisco's switches "slavishly," explaining that such copying is designed to make an Arista switch operate just like a Cisco switch from the perspective of a user. *See* Packetpushers, "Show 45 – Arista – EOS Network Software Architecture – WebinarEx" audio file, available at <https://packetpushers.net/podcast/podcasts/show-45-arista-eos-software-architecture/> at 55:44-55:45. Arista has tried to "[p]rovide familiar interfaces to ease adoption" including a "standard CLI that ... retains familiar management commands" such that "80% [of Arista customers] tell [Arista] they appreciate the way they can leverage their deep [Cisco] IOS experience, as they can easily upgrade an aging [Cisco] Catalyst infrastructure to Arista." *See* Ex A to Holmes Decl.

During discovery, Arista demanded that Cisco explain Arista's own copying conduct in detail, and Cisco has done so. In April 2015, Arista asked Cisco to identify "every similarity that Cisco contends is a basis for its claim of copyright infringement." *See* Dkt. 306-1 at 4 (interrogatory No. 2). Cisco responded in May 2015 with extensive details. *See* Dkt. 306-2 at pp. 8-10 and Exhibit A thereto (a 221-page table showing overlap between Cisco versus Arista materials). And, as fact discovery proceeded and Cisco has been able to get information from Arista regarding the materials that Arista copied, Cisco has supplemented that interrogatory response numerous times—as provided under the Federal Rules of Civil Procedure.¹

¹ *See* Holmes Decl., Ex. B (Exhibit B to Cisco's supplemented response to Arista's Interrogatory 2, a 102-page chart showing overlap between Cisco's versus Arista's command expressions and identifying the Cisco copyrighted work and the Arista infringing work in which the command expression appears); Holmes Decl., Ex. C (Exhibit C to Cisco's supplemented response to Arista's Interrogatory 2, a chart showing the same for copied command modes); Holmes Decl., Ex. D (Exhibit D to Cisco's supplemented response to Arista's Interrogatory 2, showing an exemplary instance of Arista copying Cisco's command hierarchies); Holmes Decl., Ex. E (Exhibit E to Cisco's supplemented response to Arista's interrogatory No. 2, a 27-page chart showing Arista's copying of Cisco's command responses).

1 In January 2016, Cisco disclosed to Arista that it had learned during fact discovery that
 2 Arista's verbatim copying included "the interactive 'help' screens from Cisco's copyrighted works."
 3 Dkt. 306-6 at pp. 17-18. Cisco provided an example of a specific instance of that copying by Arista,
 4 and provided a screen shot. *Id.* Cisco likewise explained that it had learned that:

5 Arista's copying of the help screen displays extends to the description of various command
 6 expressions. In both Cisco's CLI and Arista's CLI, users can type "?" to generate context
 7 sensitive help, including a list of available commands and descriptions thereof. Arista has
 8 copied numerous examples of Cisco's original command expression descriptions (e.g.,
 9 explaining that the "enable" command will "Turn on privileged commands").

10 *Id.* at p. 18. When Cisco made this supplemental disclosure, it noted that "Cisco's discovery
 11 regarding these screen displays is ongoing, and Cisco reserves the right to supplement its response in
 12 light of information learned subsequently from *Arista's source code* and/or *operable Arista devices*,
 13 *which Cisco has requested but Arista has not yet produced.*" *Id.* (emphasis added).

14 Cisco thereafter continued to review Arista's source code to provide citation to the infringing
 15 material. But Arista did not produce operable versions of its accused switches for Cisco's counsel and
 16 experts to test until May 18, 2016, just 9 days before the close of fact discovery on liability issues for
 17 this case. Holmes Dec. at ¶3. The process of searching for, identifying, and then confirming (via
 18 Arista's source code and Arista's late-produced operable devices) instances of "HelpDesc" content
 19 was a labor-intensive task that was not finished until May 27, 2016. *Id.* at ¶4. Once that process was
 20 complete, before the close of discovery on liability issues, Cisco promptly served the further
 21 supplemental response to Arista's Interrogatory 2 at issue here. That response included [REDACTED]

22 [REDACTED] See Dkt. 306-7 at p. 16; *see also* Dkt. 306-8 (Exhibit G to that supplemental response, [REDACTED])

23 [REDACTED]
 24 [REDACTED]; Dkt. 306-9 (Exhibit H to that supplemented
 25 response, [REDACTED])
 26 [REDACTED]). Cisco thus

27 supplemented Arista within nine days of Arista making operable versions of its products available to

1 Cisco, seven days before opening expert reports were due for copyright infringement issues, and three
 2 weeks before rebuttal expert reports were due. (Dkt. 253).

3 **B. Cisco's Claim for "Lost Profits" Damages**

4 Cisco first disclosed that it would seek lost-profits damages at the start of this lawsuit in
 5 December 2014, well before fact discovery even began. *See* Dkt. 1 at pp. 22-24 (praying for "all
 6 damages suffered by Cisco" including "lost profits suffered by Cisco as a result of Arista's [patent]
 7 infringement"). On March 26, 2015, Cisco served Arista with requests for documents and an
 8 interrogatory requesting documents and information regarding sales made by Arista of the accused
 9 products. *See* Holmes Decl., Exhs. F and G.

10 In response, Arista stonewalled. On April 30, 2015, Arista served objections to Cisco's
 11 requests for documents sufficient to show sales data for the accused products; did not produce any
 12 such documents; and did not even agree to produce such documents (or even a sub-set of the requested
 13 documents) in the future. Instead, Arista offered to "meet and confer" regarding Cisco's requests. *See*
 14 Holmes Decl., Ex. H. at pp. 20-22 (for Cisco RFP Nos. 26-29). Likewise, Arista refused to
 15 substantively respond to the interrogatory, stating that Arista does not keep such information in the
 16 ordinary course of business, and offering to supplement the response at some unspecified point in the
 17 future with the production of unspecified documents. *See* Holmes Decl., Ex. I at pp. 7-8.

18 Notwithstanding Arista's refusals to provide Cisco with any responsive information about the
 19 sales of Arista's accused products, Arista asked Cisco to explain its lost-profits damages theories. *See*
 20 Dkt. 306-1 at Rog 1 and Rog 15 ("If You seek to recover lost profits by way of any claim in this
 21 matter, identify with specificity all bases . . ."). Cisco responded timely to that interrogatory in May
 22 2015 and provided what information it could, in light of Arista's lack of disclosure of any information
 23 regarding its customers or sales of the accused products. *See* 306-2 at p. 6 (identifying supporting
 24 evidence for the position that "Arista uses its infringing products to take sales (and profits) from
 25 Cisco"); *id.* at 7 (same for the position that "Cisco is entitled to actual damages (in the form of, among
 26 other things, Cisco's lost profits and any additional profits made by Arista)"); *id.* (noting that "Arista
 27 has not yet produced detailed sales records"); *id.* at 8 ("Cisco is entitled to its actual damages (e.g.,

1 lost profits) . . . Arista has not yet produced detailed sales records”); *id.* at 27 (for the interrogatory
 2 specific to lost profits, responding that “Cisco further objects to this interrogatory to the extent that it
 3 calls for information that is in Arista’s control, but which Arista has not yet produced.”).

4 In July 2015, Cisco again supplemented its lost profits interrogatory response, even though
 5 Arista still had failed to produce any documents or information quantifying its sales to particular
 6 customers. Cisco explained its bases for seeking lost profits in further detail, cited to Bates-numbered
 7 documents and publicly-available sources of evidence, cited to statements from Arista executives, and
 8 identified categories of relevant witnesses. Holmes Decl., Ex. I at pp. 6-9. Cisco noted that “Arista
 9 [still] has not produced sufficient information regarding its sales or customers for Cisco to identify
 10 specific sales lost to Arista, or to quantify Cisco’s resulting lost profits more precisely.” *Id.* at p. 8.

11 On May 25, 2016, just 16 days before the close of fact discovery for damages-related issues,
 12 Arista finally provided Cisco with confidential information regarding its customers and its sales of
 13 accused products. On June 7, 2016—just 13 days after obtaining Arista’s confidential materials—
 14 Cisco promptly supplemented its response to Arista’s Interrogatory No. 15, identifying specific
 15 customers to whom Arista had made sales that might support lost-profits damages. *See* Dkt. 306-7 at
 16 pp. 9-10; *see also* Holmes Decl., Exhs J, K. This supplementation thus was completed before the
 17 close of fact discovery on damages-related issues; three weeks before the deadline for opening expert
 18 reports on damages; and over a month before the deadline for rebuttal expert reports on damages. *See*
 19 Docket No. 277 at 1-2.

20 C. Arista’s Discovery Supplementations

21 Arista itself served numerous supplemental interrogatory responses at the very close of
 22 discovery. At 9:51 pm on May 27, 2016, it served supplemental responses to nine of Cisco’s
 23 interrogatories (i) asserting that 25 other companies use Cisco’s command expressions, (ii) claiming
 24 that Cisco’s copyright registrations for more than 200 commands were made more than five years
 25 after the first publication of the work, (iii) identifying more than 1,500 documents that it claims
 26 support its defenses. Holmes Decl. at Ex. L. In the last two days of liability fact discovery, Arista
 27 produced more than 229,000 pages from more than 22,000 documents, and between the close of fact

1 discovery for liability and fact discovery for damages, Arista produced an additional 7,500 pages from
 2 nearly 500 different documents—with all these last-minute documents including important financial
 3 data. Holmes Decl. ¶5. Since damages fact discovery closed on June 10, 2016, Arista has produced
 4 more than 23,000 pages from 900 documents, including Arista internal documents that relate to
 5 Arista’s command expressions. *Id.*

6 **III. LEGAL STANDARD**

7 Under the Federal Rules of Civil Procedure, a party has an obligation to supplement its
 8 discovery responses “in a timely manner if the party learns that in some material respect the disclosure
 9 or response is incomplete or incorrect, and if the additional or corrective information has not
 10 otherwise been made known to the other parties during the discovery process or in writing.” Fed. R.
 11 Civ. P. 26(e)(1)(A). “Supplementation should be made ‘in a timely manner, or as ordered by the
 12 court, during the discovery period with special promptness as the trial date approaches.” 6-26
 13 Moore’s Federal Practice - Civil § 26.131. Courts are most likely to exclude evidence when a party
 14 first discloses the material at issue “shortly before trial or substantially after discovery has closed.”
 15 *Jackson v. United Artists Theatre Circuit, Inc.*, 278 F.R.D. 586, 594 (D. Nev. 2011).

16 If the Court determines that a party’s supplementation of discovery responses was not timely,
 17 “the party is not allowed to use that information” unless the party can show that the delayed response
 18 was failure was either “harmless” or “substantially justified.” Fed. R. Civ. P. 37(c)(1); *Yeti by Molly,*
 19 *Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir. 2001). Among the factors that a Court
 20 may consider in determining whether untimely supplementation is justified or harmless are:
 21 (1) prejudice or surprise to the party against whom the evidence is offered; (2) the ability of that party
 22 to cure the prejudice; (3) the likelihood of disruption of the trial; and (4) bad faith or willfulness
 23 involved in not timely disclosing the evidence.” *Lanard Toys, Ltd. v. Novelty, Inc.*, 375 Fed. Appx.
 24 705, 713 (9th Cir. 2010).

25 **IV. ARGUMENT**

26 Cisco’s supplemental responses to Arista’s interrogatories were made within the fact discovery
 27 period and were timely. Supplementation of discovery is often found to be appropriate even when

made after the relevant discovery cut-off deadline. *See Lanard Toys, Ltd. v. Novelty, Inc.*, 375 Fed. Appx. 705, 713 (9th Cir. Cal. 2010) (expert report served six weeks after the court ordered deadline for such reports was not excluded because there was no prejudice to the opposing party); *Nei Contr. & Eng'g v. Hanson Aggregates, Inc.*, 2016 U.S. Dist. LEXIS 60624 (S.D. Cal. May 5, 2016) (documents produced after discovery deadline were not excluded because “locating this evidence was burdensome and time consuming,” among other factors). The cases that Arista cites to on this point are inapposite. For many of the cases that Arista relies on, the excluded discovery was not produced until after the court-ordered deadline for discovery, which is not the case here. *See Jones v. Travelers Cas. Ins. Co. of Am.*, 304 F.R.D. 677, 678–79 (N.D. Cal. 2015 (relevant documents produced three weeks after the close of discovery); *Ritchie Risk-Linked Strategies Trading (Ireland), Ltd. v. Coventry First LLC*, 280 F.R.D. 147 (S.D.N.Y. 2012) (claimed damages were not disclosed until after the close of discovery); *Apple, Inc. v. Samsung Elecs. Co.*, No. 11-CV-01846-LHK, 2012 WL 3155574, at *4 (N.D. Cal. Aug. 2, 2012) (supplemental interrogatory responses served after the close of discovery); *Specht v. Google Inc.*, 758 F. Supp. 2d 570, 578 (N.D. Ill. 2010), *aff'd*, 747 F.3d 929 (7th Cir. 2014) (plaintiff served supplemental interrogatory responses four months after the close of written discovery, disregarded the procedure by which the court ordered it to present the disputed discovery, and the plaintiff provided “no legitimate reason why they could not have disclosed” the information earlier).

The other cases on which Arista relies are easily distinguished from the case at bar. In *Deutsche Bank Nat'l Trust Co. v. Seven Hills Master Cmty. Ass'n*, the defendant produced news articles on the last day of discovery that had been available to it throughout the entire discovery period. No. 15cv-1373, 2016 WL 1639885, at *2–3 (D. Nev. Apr. 25, 2016). That is not the case here, where Cisco relied on Arista's delayed productions of its own documents and switches in order to supplement its interrogatories. Likewise, in *Finjan, Inc. v. Proofpoint, Inc.*, the Court struck the disclosure of two witnesses made three days before the close of discovery, noting that the defendants had known about one witness for a year and one for at least “several months” and that plaintiffs did not have time to depose the witnesses before the close of discovery. No. 3:13-cv-05808-HSG (HRL), 2015 WL 9900617, at *1 (N.D. Cal. Oct. 26, 2015); *Vieste, LLC v. Hill Redwood Dev.*, No. 09-cv-

1 04024-JSW (DMR), 2011 WL 2181200, at *2 (N.D. Cal. June 3, 2011) (similar). The case here is a
 2 far cry from any of those Arista cites.

3 **A. Cisco's Supplemental Response on "HelpDesc" Was Timely**

4 As reviewed above, Cisco disclosed to Arista its findings that Arista had infringed its
 5 copyrighted "HelpDesc" materials, and exemplary instances of that copying, at least as early as
 6 January 2016—five months before the close of fact discovery. Cisco further supplemented its
 7 response to Interrogatory 2 with materials showing further instances of "HelpDesc" copying as soon
 8 as Cisco's experts concluded their review and analysis of Arista source code and shortly after Arista
 9 made operable versions of its devices available to Cisco. That supplementation was also timely under
 10 the Court-ordered schedule for this case. Moreover, Cisco's supplementation was consistent with
 11 Arista's practices of supplementing as fact discovery was winding down.

12 **B. Cisco's Supplemental Response on "Lost Profits" Was Timely**

13 On June 7, 2016, Cisco in a supplemental response to Interrogatory 15 identified specific
 14 customers to whom Arista had made sales and for which Cisco reserved the right to demand lost-
 15 profits damages. *See* Holmes Decl. Ex. K. Arista concedes, as it must, that that response was served
 16 before the deadline for fact discovery on damages-related issues in the case. *See* Dkt. 277. More
 17 importantly, Cisco served that customer-specific response just 13 days after Arista disclosed on May
 18 25, 2016—for the first time—its sales data, including sales on a per-customer basis. Cisco's
 19 disclosures thus were in direct response to (and could not have been formulated without) confidential
 20 Arista information that Cisco starting requesting in March 2015 but that Arista waited 14 months to
 21 produce in May 2016.

22 Arista nonetheless argues (Mot. 9-10) that Cisco could and should have identified lost sales to
 23 specific customers earlier in the case based exclusively on Cisco's internal documents, without having
 24 information about Arista's sales of accused products to particular customers. That argument is
 25 meritless. In order to show that it is entitled to recover lost profits as a measure of "the actual
 26 damages suffered by him or her as a result of the infringement" under 17 U.S.C. § 504, Cisco is
 27 required to show that Arista *actually* made the sale in question to a particular customer. In this case,

1 neither Cisco nor its counsel knew what sales Arista had actually made (to what customers, in what
 2 amounts, of what products) until Arista produced that information to Cisco's counsel. Where Arista
 3 delayed more than a year before producing its financial documents, and Cisco supplemented its
 4 responses less than two weeks later and still within the discovery period set out by the Court, Cisco's
 5 supplemental response cannot be found untimely.²

6 **C. Arista Suffered No Prejudice From Cisco's Supplemented Interrogatory Answers**

7 Even if Cisco's supplemented interrogatory answers on lost profits and "HelpDesc" copying
 8 were somehow untimely (they were not) the motion to strike Cisco's supplemental interrogatory
 9 answers should still be denied. *First*, Arista was not and could not have been surprised by Cisco's
 10 "HelpDesc" allegations or lost-profits damages theory. Cisco disclosed "HelpDesc" copying by
 11 Arista in January 2016, providing an example of that copying at that time. Cisco disclosed its lost
 12 profits theories and supporting evidence starting with the complaint filed in December 2014 and
 13 supplemented with supporting evidence throughout fact discovery in 2015 and 2016. And, of course,
 14 Arista had knowledge of its customer list and which of its customers were former "Cisco shops"
 15 throughout the case.

16 *Second*, the supplemental interrogatory responses caused no prejudice to Arista. Cisco
 17 disclosed its theory and supporting evidence for the "HelpDesc" allegations in comprehensive detail
 18 before opening expert reports on copyright infringement were due, before rebuttal expert reports on
 19 copyright infringement were due, and before expert discovery had even started. Arista can claim no
 20 prejudice from the fact that Cisco later, through laborious source-code review and testing of Arista's
 21 late-produced devices, supplemented by adding further specific instances of Arista's HelpDesc

22
 23 ² Arista argues (Mot. 9-10) that Cisco somehow could have disclosed a per-customer theory of
 24 lost profits earlier in the case—based exclusively on Cisco's internal documentation—because a Cisco
 25 employee who was designated as a corporate representative to cover financial and damages topics
 26 testified that he assisted in the preparation of Cisco's supplemental interrogatory response by
 27 consulting only Cisco documents. But it should be no surprise that a Cisco employee—not counsel of
 record in this case, and not permitted to view Arista's confidential sales documents under the
 Protective Order for this case—did not consult any Arista materials when he assisted Cisco counsel in
 preparing a supplemental interrogatory answer. The only thing that shows is that Cisco's counsel
 abided the Protective Order and did not show Arista's confidential documents to a Cisco employee.

1 copying to the responses served in fact discovery before expert discovery began. Similarly, Cisco
 2 disclosed its lost-profits “customer list” before Arista deposed Cisco’s corporate representative on the
 3 topic, before either side’s opening expert reports on damages were due, before rebuttal expert reports
 4 on damages were due, and before expert discovery had even started. *See* Dkt. 253. Thus Arista has
 5 had ample opportunity to respond to the specification of its own potentially alleged customer “wins”
 6 against Cisco.

7 Third, Arista was not prejudiced by the supplemental response to the lost-profits interrogatory
 8 because both parties produced voluminous communications and documents regarding competition
 9 between the parties and sales Cisco may have lost to Arista, which are fundamental to all of Cisco’s
 10 claims to relief—lost profits, infringer’s profits, and injunction to remedy irreparable harm. Arista
 11 took extensive discovery from Cisco and third-party witnesses on Cisco’s lost sales.³

12 **V. CONCLUSION**

13 Arista’s Motion to Strike should be denied in its entirety.

14 Dated: June 27, 2016

Respectfully submitted,

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23 ³ *See, e.g.,* Holmes Dec., Ex. M, Jiandani Dep. at 61:18-65:24 [REDACTED]
 24 [REDACTED], 196:10-197:4 (regarding [REDACTED]), 215:23-219:24 (regarding [REDACTED]
 25 [REDACTED]), 242:20-243:16 (regarding [REDACTED]), 262:11-265:1 (regarding [REDACTED]s); Holmes Dec., Ex. N,
 26 Chambers Dep. at 110:2-112:18 (regarding [REDACTED]), 113:22-114:20 (regarding [REDACTED]);
 27 Holmes Dec. Ex. P, Malik Dep. at 19:17-23 (regarding [REDACTED]), 174:1-15 (regarding [REDACTED]), 190:6-22 (regarding
 [REDACTED]); Holmes Dec., Ex. O, Birnbaum Dep. at 14:8-15:18, 38:25-41:2 (regarding [REDACTED]).

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